IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH

WEDNESDAY, THE 13TH JUNE 2007 / 23RD JYAISHTA 1929

OP.No. 19500 of 1997(U)

PETITIONER:

T.K.SHAHAL HASSAN MUSALIYAR,
BELAIRE, KILLIKOLLOOR, KOLLAM.

BY ADV. SRI.HARUN-AL-RASHID

RESPONDENTS:
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1. BANK OF BARODA, REP. BY THE BRANCH MANAGER,
KOLLAM BRANCH, KOLLAM.

2.DEBT RECOVERY TRIBUNAL,
SPENCERS TOWERS, 6TH FLOOR,
NO.770A, ANNA SALAI, CHENNAI.

3. THE SUB COURT, KOLLAM.

4.UNION OF INDIA, REP. BY THE MINISTRY OF LAW AND JUSTICE,
NEW DELHI.

5.M/S.KHORMUS INTERNATIONAL COMPANY, REP. BY
T.K.MUSALIYAR H. SHAHAL,
S/O.THANGAL KUNJU MUSALIAR,
MUSALIAR COMPOUND, KILIKOLLOOR,
KOLLAM.

BY ADV. SRI.MPR.NAIR
SRI.DEVAN RAMACHANDRAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 13/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.4406/98 IN O.P.NO.19500/97

DISMISSED

13.6.2007. SD/- KURIAN JOSEPH, JUDGE.

A P P E N D I X

PETITIONER'S EXHIBITS :

EXT.P1 : TRUE COPY OF JUDGMENT DT. 3.3.87 IN CASE NO.82/87 PRODUCED BY THE FIRST RESPONDENT EBFORE THE SUB COURT, KOLLAM.

EXT.P2 : TRUE COPY OF THE PLAINT FILED BEFORE DUBAI CIVIL COURT IN O.S.NO.271/87.

EXT.P3 : TRUE COPY OF THE PLAINT IN O.S.NO.271/1987 FILED BY THE FIRST RESPONDENT BEFORE THE COURT OF SUBORDINATE JUDGE, QUILON.

EXT.P4 : TRUE COPY OF WRITTEN STATEMENT FILED BY THE PETITIONER.

EXT.P5 : TRUE COPY OF THE NOTICE ISSUED BY THE TRIBUNAL AT CHENNAI.

TGS

C.R.

KURIAN JOSEPH J.

O.P. No.19500 of 1997

Dated 13th June, 2007.

J U D G M E N T

Whether a suit for recovery of money due to a bank/financial institution, based on a foreign judgment is liable to be transferred to the Debt Recovery Tribunal and if so, at what stage, is the issue arising for consideration in this case.

2. Ext.P1 is the foreign judgment rendered by the Civil Court of First Instance, Dubai in Civil Case No.82/87. The first respondent herein viz., Bank of Baroda is the plaintiff, the 5th respondent is the first defendant and the second defendant is one Tabakhol Kongoma Musaliar H.Shahal. The suit was one for money. The suit was decreed, ordering recovery of Dhs.711,476.20 with interest and costs. Based on Ext.P1 foreign judgment, Ext.P3 suit was filed by the Bank before the Subordinate Judge's Court, Kollam, as O.S.271/87 praying for a decree to realize equivalent amount in Indian currency with interest and costs. The petitioner filed written statement

contending that the petitioner is not a party to the suit, necessary parties have not been joined in the suit and that there is no decree against him. There are various other contentions as well, including the contention that no proper notice was served on the defendants, the suit is barred by limitation etc. While the suit was pending trial, the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short, 'the Act') came into force. In exercise of the power under Section 31 of the Act, the suit was transferred to the Debt Recovery Tribunal, Chennai. It is the main contention of the petitioner that being a suit based on a foreign judgment, unless the judgment has become and held to be conclusive between the parties as per Section 13 of the Code of Civil Procedure, and without a finding to that effect by the civil court, the suit cannot be transferred at all.

3. According to the Bank, being a suit filed by the Bank for recovery of money, the same is to be exclusively tried by the Tribunal. In order to appreciate the various contentions taken by the parties, it is necessary to refer to the various provisions under the Code of Civil Procedure,, 1908 as well as the Recovery of Debts due to Banks and Financial Institutions Act, 1993. Section 2 (6) of the Code of Civil Procedure defines foreign judgment as the

judgment of a foreign court. Section 13 provides for situations where a foreign judgment is not conclusive. The provision reads as follows :-

> "13. When foreign judgment not conclusive :- A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-
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> (a) where it has not been pronounced by a Court of competent jurisdiction;
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> (b) where it has not been given on the merits of the case;
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> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
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> (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
>
> (e) where it has been obtained by fraud;
>
> (f) where it sustains a claim founded on a breach of any law in force in India."

There has to be an enquiry whether the judgment attracts any of the exceptions enumerated in the clauses, on the following aspects, apart of course from the acid test as to whether the judgment is between the same parties or between parties under whom they or any of them claim litigating under the same title: (i) that the judgment has been pronounced by a court of competent jurisdiction, (ii) that it is rendered on the merits of the case, (iii)

that it does not appear on the face of proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases where it is applicable (iv) that the proceedings in which it was obtained are not opposed to natural justice, (v) that it has not been obtained by fraud, or (vi) that it does not sustain a claim founded on a breach of any law in force in India. Except for the above six situations a foreign judgment is to be taken as conclusive, either as a sword or as a shield. In short, the foreign judgment should be one rendered on the correct perspective of private international law, in due recognition of the law of India in cases in which such law is applicable and the finer concept of justice in India.

4. A foreign judgment, though recognised on the doctrine of obligation cannot be enforced by direct execution in India. It can be enforced only by the institution of a suit upon the judgment, except under Sections 44 and 44A of the Code which deal with the execution of decrees of Revenue Court, if notified in the official gazette and execution of decrees passed by courts in reciprocating territories respectively.

5. Under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, where a Bank or a

financial institution has to recover a debt from any person, it may make an application to the Tribunal established under Section 3 of the Act. Under Section 17 read with Section 18, the jurisdiction is exclusively on the Tribunal to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Under Section 19(4), "On receipt of the application under sub-section (1) or sub-section (2), the Tribunal shall issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted." Under sub-section (5), the defendant is entitled to file a written statement of his defence. Under sub-section (24), the Tribunal is expected to deal with the applications "as expeditiously as possible and endeavour shall be made by it to dispose of the application finally within one hundred and eighty days from the date of receipt of the application." Section 22 of the Act provides for procedures and powers of the Tribunal and the Appellate Tribunal, which reads as follows :-

> 22. Procedure and Powers of the Tribunal and the Appellate Tribunal.-- (1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908(5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to

regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:--

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it *ex parte*;

(g) setting aside any order of dismissal of any application for default or any order passed by it *ex parte*;

(h) any other matter which may be prescribed.

(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

6. A perusal of the scheme of the Act as noted above, would clearly show that the procedure is summary. There is hardly any scope for the enquiry as to the defences enumerated under Clauses (a) to (f) of Section 13 of the Code as to whether a foreign judgment is conclusive. Only if the foreign judgment is

conclusive, there can be a valid application under Section 19 for recovery of any debt from the defendant. A suit that is to be transferred to the Tribunal under Section 31 of the Act is a suit for recovery of debts due to the banks and financial institutions. Since the suit is based on a foreign judgment, prior to the transfer, it is incumbent on the civil court to conduct an enquiry as to whether the foreign judgment has become conclusive between the parties. Since it is specifically provided under Section 22 of the Act that the Tribunal is not bound by the procedure laid down by the Code of Civil Procedure and that the guidance is only the observance of the principles of natural justice, the Tribunal is not in a position to investigate as to whether the matter is directly adjudicated between the same parties and whether the same is conclusive as per Section 13 of the Code of Civil Procedure. Section 31 of the Act is intended for transfer of suits or other proceedings pending for recovery of debts due to banks and financial institutions. By taking recourse to Section 31, the civil court cannot delegate its power to adjudicate the questions set out in Section 13 of the Code of Civil Procedure to a Tribunal constituted under the Act. The rules laid down in Section 13 are rules of substantive law and not merely

the procedure and therefore the only authority vested with the jurisdiction to adjudicate the questions enumerated under Section 13 is the civil court. Even otherwise, in view of the bar under Section 22 of the Act on the observance of the procedure under the Code, the Tribunal cannot apply Section 13 of the Code.

7. It is fairly clear from the proceedings of the Subordinate Judge's Court, Kollam that there is no finding as to the conclusive nature of Ext.P1 foreign judgment, without which a suit based on the said judgment by the Bank cannot be transferred to the Debt Recovery Tribunal, since the conclusive nature of the foreign judgment is for the civil court to decide. Only after rendering such a decision, a suit instituted by the Bank based on the foreign judgment, for recovery of debts due to the Bank, can be transferred to the Debt Recovery Tribunal. The orders transferring the suit, O.S.271/87 from the Subordinate Judge's Court, Kollam is accordingly set aside. There will be a direction to the second respondent Tribunal to re-transmit the records forthwith to the Subordinate Judge's Court, Kollam. Being a suit of 1987, the Subordinate Judge's Court, Kollam is directed to take a decision as to whether Ext.P1 judgment has become conclusive between the parties, within a period of six months from the date

of receipt of the records from the Debt Recovery Tribunal.

The Original Petition is disposed of as above.

KURIAN JOSEPH, JUDGE.

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KURIAN JOSEPH, J.

O.P. NO.19500 OF 1997 (U)

J U D G M E N T

Dated 13th June, 2007.